

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of J.L.M, JR., Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

SAMANTHA ALTHER,

Respondent-Appellant,

and

DEVON EDWARD HOLLEY,

Respondent.

In the Matter of J.L.M., JR., Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

DEVON EDWARD HOLLEY,

Respondent-Appellant.

UNPUBLISHED

July 15, 2003

No. 244984

Grand Traverse Circuit Court

Family Division

LC No. 01-000277-NA

No. 245299

Grand Traverse Circuit Court

Family Division

LC No. 01-000277-NA

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I concur with the majority opinion regarding respondent Devon Edward Holley in Docket No. 244984. However, I respectfully dissent from the opinion concerning respondent Samantha

Alther in Docket No. 245299. In my view, the circuit court reached the correct result with respect to each respondent. Thus, I would affirm the circuit court's order in its entirety.

The circuit court found "[t]hat the conditions leading to the adjudication continue to exist and there is no reasonable likelihood that [the] conditions will be rectified within a reasonable time . . . , contrary to MCL 712A.19b(3)(c)(i)." See also MCL 712A.19b(5) (requiring termination under any ground in subsection (3) unless clearly not in the child's best interests), and *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000) (setting out the clearly erroneous standard of review for termination of parental rights cases).

Indeed, the original conditions of Alther's home were deplorable.¹ Nothing in this record, other than speculation, has improved these conditions. See *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990) (this Court's review is limited to the trial court record); *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000) (this Court will not allow enlargement of the record on appeal).

The facts of this case reveal that at the time of the adjudication, Alther did not have a job and she had failed to hold two previous jobs. She had no prospects for a job in the near future and had expressed a preference to stay unemployed, contrary to her parent-agency agreement. In addition, her housing situation was tenuous at best. Living with a new boyfriend at the boyfriend's mother's house did not meet the requirements of the agency plan. Moreover, two previous attempts to terminate Alther's parental rights were made, and Alther missed counseling sessions and visits with her child. Alther was supposed to attend counseling on a weekly basis for ten months. According to the record, she only went to 6.4 sessions and turned down extra visits with her child. How does any mother who is facing a termination proceeding miss counseling sessions and turn down visits with her child?

Significantly, the child's foster mother testified that after visitation with Alther, the child returned dirty, congested, and smelling of smoke, exactly contrary to the instructions given to Alther. (The child was originally removed from Alther's care because of unsanitary conditions in the home, including excessive dirt causing the child's bed sheets to turn brown, and living in what was described as a "flophouse.") Based on this record, Alther's improvements, if any, were minimal.

What happened in this case is that Alther's living conditions were so deplorable that her child was removed from her home. Alther made no progress for the first six months, leaving petitioner no choice but to continue termination proceedings. To Alther's credit, she gave indications that she would improve her housing situation in the future. Unfortunately for Alther, petitioner can only determine whether the conditions have improved by observing the respondent's current conduct. At the time of the adjudication, Alther did not have a residence of

¹ I note that during Alther's testimony at the preliminary hearing, she admitted that the conditions of her home were poor.

her own and petitioner had no way to conduct visits to check on her housekeeping and parenting skills.²

The majority opinion speculates that Alther can take care of her home. However, the evidence of record does not support this conclusion. See *Amorello, supra*. Living with her new boyfriend's mother does not establish this fact. There is no track record to establish that Alther can handle housekeeping chores and child rearing. However, there is sufficient proof that she cannot do it.

The trial court is in the best position to judge the credibility of witnesses. See, generally, *Helms v Helms*, 185 Mich App 680, 684; 462 NW2d 812 (1990) (custody determination). Working from a sterile appellate record, without the ability to personally witness the events and emotions that unfold before the trial court, is not the equivalent of directly observing the human condition as it portrays itself in the trial court. Appellate courts should be wary about second-guessing trial court decisions concerning the human condition, especially in termination of parental rights cases. In light of the proofs established at trial and the circuit court's decision terminating Alther's parental rights, see *In re Trejo, supra*, I would affirm the court's opinion.

/s/ Peter D. O'Connell

² At the time of the final hearing in this matter, respondent Samantha Alther was not living in a place of her own. Her attorney's claim in his closing statement at the termination hearing that Alther had moved into a place of her own is not admissible evidence in this case. See SJI2d 3.04 (statements of attorneys during a proceeding are not evidence). In any event, given the conditions of Alther's former residence, I have serious doubts about the home Alther can currently provide for her child.